DRAFT Assessment—for Citizen Trade Policy Commission review

Report to the Labor and Economic Development Subcommittee of the Maine CTPC

As part of the work plan, the Forum on Democracy & Trade agreed to analyze "how Maine can effectively use state and local procurement to promote local and state economic development without conflicting with trade rules." This report contains three sections:

1) Background on the issue of Government Procurement in Global Trade Agreements
2) Notes on areas of Maine's on-going leadership in government procurement, and comparative notes on Maine's and other states' approaches to trade and procurement. Maine has been a leader with respect to promoting and modeling standards for labor and human rights in its procurement practices. Increasingly, Maine is also attempting to use its procurement dollars to promote economic development in the state.
3) Notes on particular issue areas pertaining to government procurement, possible remedies, opportunities/risk, and possible action items for the Maine CTPC.

1) Background.

Government procurement first surfaced as an issue of international trade negotiations during the Tokyo Round (concluded 1979) and led to the establishment of the GATT "Government Procurement Code." This code, covering central government procurement, was extensively revised in the Uruguay Round of negotiations, and resulted in the establishment of the WTO "Government Procurement Agreement" (GPA). The GPA is a "plurilateral" agreement. This means that unlike most other WTO agreements, in which as a condition of WTO membership the Party (country) is automatically subject to the disciplines of that agreement, not all WTO members are parties to the GPA—they can accede to the agreement separately from their WTO membership. Partly for this reason, "cross-retaliation" between the GPA and other WTO agreements is prohibited. At present, it is primarily wealthier countries that have signed on to the GPA. For example, Canada is a signatory of the GPA; Mexico is not. Both European trade negotiators and USTR have pushed hard to see China join the GPA as a part of its WTO obligations, but to date this has not occurred.

Under WTO rules, the fundamental obligations of "covered entities"—that is, central and subfederal governments[1]--include:

- *Non-discriminatory treatment.* Goods, services, and foreign suppliers of goods/ services must be treated "no less favorably" than U.S. firms/suppliers. The WTO Secretariat and USTR have presented this "non-discrimination" standard as one simply to prevent discrimination against foreign bidders. In fact, the GPA goes well beyond this. It limits the criteria for government procurement decisions to

[1] U.S. local governments are not covered by the terms of the GPA, or any subsequent international trade agreements that include procurement chapters.

price and 'performance'—implicitly using a presumption against any social criteria for awarding contracts. This question is explored more fully below.

- *No use of offsets.* The GPA "prohibits government entities from considering, seeking, or imposing 'offsets' as a condition for award of contracts….'Offsets' are measures used to encourage local development or improve the balance-of-payments accounts by means of domestic content, licensing of technology, investment requirements, counter-trade, or similar requirements." (Article XVI).
- *Publishing obligations:* States that have agreed to be listed in the GPA are required to publish their tender invitations on a federal-government website.
- *Prohibits the use of technical standards* whose purpose or effect is to create unnecessary obstacles to trade. The wording of this prohibition of technical standards has been controversial, as several WTO members have argued that the use of environment and labor/human rights "process" standards as criteria in government procurement is therefore against WTO rules.[2]

Two other considerations also apply to the General Procurement Agreement:

- *Dollar threshold:* For committed states, the threshold at which GPA rules on most goods and services come into effect is about $500,000. For construction services, the figure is about $6.8 million.[3]
- *General exceptions* include: measures necessary to protect public morals, order or safety; to protect human, animal, or plant life and health; to protect intellectual property; or which relate to the products or services of handicapped persons, of philanthropic institutions, or of prison labor. How far such exceptions extend is subject to much debate in the WTO system. Thus far, none of these general exceptions has been given the sort of expansive reading that would allow Maine at present to be secure in citing moral/environmental/social values as reasons for particular purchasing choices.

The most significant development concerning states and government procurement came in the Uruguay Round negotiations in the early 1990s, when the United States was pushing vigorously to make government procurement a stronger part of the WTO system. At that time, US Trade Representative Mickey Kantor sent letters to Governors of all fifty states, emphasizing the new trade opportunities that would materialize from an international agreement on government procurement, and asking that Governors commit their states to be bound by the disciplines of the Government Procurement Agreement.

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[2] In February/March 2000, several members of the WTO Committee on Trade and Environment (CTE) raised concerns about the use of eco-labels and their perceived inconsistency with another of the WTO agreements, the Agreement on Technical Barriers to Trade (TBT). Several members insisted that "non-product related production and processing methods" were inconsistent with WTO rules. The WTO dispute panel in the "Tuna-Dolphin" case did not provide much clarification, as it chose to interpret the eco-label provision as a mechanism intended to counter "deceptive advertising practices"—rather than a positive statement about the good in question--and was therefore allowed. In sum, the extent to which "process" standards can be used to advance environment or labor/human rights concerns has not been definitively settled through the WTO or other international bodies dealing with commerce.

[3] The actual amount is 355,000 (and for construction, five million) "Special Drawing Rights," which is an accounting unit created by the International Monetary Fund that fluctuates somewhat in dollar terms since the unit is based on a basket of international currencies. The SDR level is unchanged since 1996.

USTR's ability to deliver state participation clearly strengthened the overall U.S. offer in the Uruguay Round, since well over half of all government procurement under the U.S. system of federalism takes place at state and local levels.

As a result of Kantor's letter, the governors of thirty-seven states agreed to adapt their procurement procedures to the dictates of the WTO's General Procurement Agreement. *Maine was one of the thirty-seven states committed.* Some states noted specific reservations; others listed only a subset of state agencies as being covered by the terms of the GPA. Maine listed the following departments for coverage:

- Department of Administrative and Financial Services
- Bureau of General Services (covering state government agencies and school construction)
- Maine Department of Transportation

USTR apparently just copied the list of states that had agreed to be committed as part of the WTO GPA when negotiating the procurement chapter of the Chile and Singapore agreements.[4]

In September 2003, USTR sent out another letter, again asking Governors to commit their states to implementing the disciplines on government procurement then being negotiated in a range of regional and bilateral trade agreements. Maine did choose to become a signatory to the US-Australia Free Trade Agreement's procurement provisions. After initially voicing his willingness to become a signatory to such provisions in the Central American Free Trade Agreement (CAFTA), Governor Baldacci rescinded the commitment proposed under CAFTA in a May 2004 letter to USTR. In 2005, the Maine CTPC was active on issues pertaining to CAFTA and other bilateral trade negotiations. Maine declined to make commitments under procurement in subsequent agreements, and the Governor's office communicated in some detail with USTR on these matters. Indeed, the Governor's 20 March 2006 letter to Ambassador Rob Portman demonstrates the care and consideration with which his office—in communication with the Maine CTPC—approached the procurement issue. This is discussed in more detail below.

The European Commission continues to argue for the negotiation of a multilateral framework for the procurement of services, based on Article XIII:2 of the GATS. The EU and the United States have taken different positions as to whether *most favored nation*, *national treatment*, and *market access* rules in the GATS would apply to procurement when the government purchases a utility service for purposes of supply/

[4] We find no evidence that Governor Angus King was ever asked to weigh in on the question of whether Maine was to be committed under the procurement chapter of these two bilateral trade agreements, signed in 2003. Certainly the Maine state legislature was not consulted on the matter. NAFTA is something of an anomaly in the process of covering state procurement. Annex 1001.1a-3 to the Government Procurement chapter of NAFTA states that "Coverage under this Annex will be the subject of consultations with state and provincial governments in accordance with Article 1024." Article 1024 of NAFTA, entitled "Further Negotiations," states that negotiations intended to lead to sub-federal coverage were to start "no later than December 31, 1998." We have no evidence that such negotiations were ever undertaken. Mexico most likely was unenthusiastic about such negotiations, and Canada's constitution would not enable the federal government there to compel provincial participation. Consequently, there is no listing of US states under NAFTA's procurement chapter.

selling to consumers. The EU has said that it "attaches great importance" to negotiations on GATS and procurement. While these negotiations on GATS and procurement do not appear to be moving at present, negotiations on *domestic regulation* in the GATS are moving, and such rules would apply to "qualification requirements"—including qualification for bidding on contracts. The United States has yet to state in its submissions to the Working Party on Domestic Regulation that it views *domestic regulation* rules as NOT applying to procurement. By contrast, the European Union has stated its position: namely, that *domestic regulation* disciplines DO apply to procurement.

Finally, on 7 October 2004, USTR sent out a Federal Register notice regarding procurement, "request[ing] written public comments with respect to the expansion of market access opportunities in government procurement under the World Trade Organization Agreement on Government Procurement." This appears to have been an opportunity for interested U.S. businesses, plus states and municipalities, to draw attention to existing barriers to their use of the WTO GPA. USTR spokespersons have asserted that the United States' main interest in the WTO GPA at present is to extend its coverage to other WTO member-countries (like China), rather than to "deepen" its coverage within the United States.

2) A comparative perspective on Maine's actions and areas of Maine's leadership on procurement.

CAFTA was a watershed agreement for state coverage of procurement chapters as for the first time a majority of states chose *not* to bind their state purchasing programs to the rules of this trade agreement. Maine was part of that trend. Communications between the Maine CPTC and the Office of the Governor appear to have helped shape procurement policy during the past two years.

In the spring of 2004, at a time when USTR was negotiating free trade agreements on a number of regional and bilateral fronts, the United States Trade Representative sent a letter to governors asking them to bind their states' procurement practices.[5] As noted previously, the initial impulse of the Governor was to grant the assent requested by USTR. However, after discussions in the state, the Governor reversed his opinion with respect to the Central American Free Trade Agreement (CAFTA).[6] Perhaps due to the fact that provisions on workers' rights were far less controversial in the US-Australia Free Trade Agreement, the Governor of Maine did sign onto the procurement chapter of that bilateral treaty. It does not appear, however, that any formal consultation with the legislature took place regarding these decisions—although some in the state pointed out

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[5] Because different FTA negotiations had advanced more than others, USTR sought a blanket agreement from states: "…to be most efficient we are requesting that Maine consider coverage for all the countries with which the United States is currently negotiating."

[6] A 23 March 2004 "Open Letter" to Governor Baldacci from PICA [Peace through Interamerican Community Action] and the Maine Fair Trade Campaign should also be noted in this regard. The reader is referred to this letter, which also contains a very readable summary of these organizations' concerns in relation to Maine's existing procurement laws/procedures. See also the response to PICA's "Open Letter" from the Maine International Trade Center, letter dated 5 April 2004, stating MITC's concerns.

that traditionally, the legislature retains authority with respect to a range of spending and procurement decisions.

By the time that USTR made another request to governors to bind their states in a new round of FTA negotiations in early 2006, it appears that the Governor had opted for a broader precautionary approach to government procurement and trade agreements. This was probably due both to legislative developments—such as LD 1015 (HP 699) designed to increase small business access to state contracts—as well as to his own leadership role in developing the Governors' Coalition for Sweatfree Procurement and Workers Rights.[7] Among the principles advanced in Governor Baldacci's 20 March 2006 letter:

- Concern that a "technical standard" designed to safeguard worker rights or the environment could be interpreted as causing an "unnecessary obstacle" to trade.
- Concern that commitment to a procurement chapter would foreclose future policy options for the state. *"I cannot jeopardize this state's ability to reevaluate its procurement policies in the future to respond to changes in social and environmental needs and priorities."*
- Concern about threats to state sovereignty. Other trade agreements assert that the federal government must "take reasonable measures" to compel states to change "non-conforming measures."[8]
- Concern about the lack of meaningful state/federal consultation. Governor Baldacci registered particular concern about the inadequacy of the "State Point of Contact" system, and the new policy of "reciprocity"[9] that is *"pitting states against each other"* on procurement matters.

Maine's engagement on the procurement issues is perhaps the most thorough-going and thoughtful response to the USTR request. If reflects communication between nonprofit

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[7] The State Division of Purchases sought to strengthen the terms and enforcement of a 2001 "sweat-free" procurement law through enhancing labor rights provisions in the State Purchasing Code of Conduct.

[8] At its most extreme, this has been interpreted to mean that the federal government is obligated to sue states in order to compel conformity with U.S. trade rules. However, the federal government might take other measures, such as withholding federal funds or federal permissions in order to compel compliance.

[9] Very briefly, this USTR policy, announced with the Andean and Panama FTA negotiations, would allow only those states that signed onto procurement chapters access to "sub-federal" procurement markets in those trade-partner countries. USTR Robert Zoellick's 2005 letter to governors announced: "This is how the new policy will work. If your state choose to participate in the new FTAs, our foreign trading partners' sub-federal entities will open their procurement to any supplier that: 1) offers goods substantially produced or services substantially performed in your state; or 2) has its principal place of business in your state." The InterGovernmental Policy Advisory Committee (IGPAC) and the National Association of State Procurement Officers (NASPO) both strongly criticized this new policy. IGPAC described it as "punitive" in a 2006 report on the Peru and Colombia FTAs, noting that the definition of "principal place of business" was so loose that essentially the new policy would discriminate only against small businesses—namely those with operations in just one state. In a 9 February 2005 letter to Ambassador Robert Zoellick, NASPO's President John Adler commented on Zoellick's previous letter to governors, noting that "According to your letter, a state will not be required to 'change its current government procurement practices.' However, your letter further states, 'Specifically, U.S. negotiators will be asking Panama and the Andean countries to open their sub-federal procurement markets to suppliers from U.S. states that agree to participate in the FTAs.' These are contradictory statements, in practical terms." It appears that Maine already grants reciprocity to foreign suppliers, and thus the use of the term "reciprocity" in this FTA text—suggesting that by not signing on, Maine has shut out foreign bidders--is misleading.

organizations, the Governor's office, the legislature, and the Maine CTPC; and issues of procurement were also raised at several of the Public Hearings conducted by the Maine CTPC. It reflects a cooperative stance and also a level of prudence with respect to the maintenance of future decision-making powers at the state level. In addition to Maine's oversight on procurement, this model is also relevant to other trade agreements that have schedules of commitments that can (supposedly) be reviewed and changed, such as the WTO General Agreement on Trade in Services.

Other states have taken different approaches. The state of **Maryland** has gone farthest in modifying its commitments. Maryland's legislature attempted to withdraw from *all* trade agreements, including those to which the state's governor had signed on. In 2005, the Maryland General Assembly passed Senate Bill 401 which "prohibits the Governor or any other State official, without explicit consent from the General Assembly, from: (1) binding the State to the government procurement rules of an international trade agreement;….The bill also declares invalid any consent previously given by the Governor or other State official to bind the State to the government procurement rules of an international trade agreement."[10] The legislature overrode the Governor's veto of this bill, but as of this writing the Governor had not submitted a letter withdrawing its commitment, and so Maryland is still listed as committed under the WTO General Procurement Agreement. USTR staff had said publicly that it would not remove Maryland from any procurement agreements unless it received a letter from the Governor explicitly instructing USTR to do so. While the outgoing Governor in that state is unlikely to take this step, the change of leadership in Maryland may result in such a request now being forwarded. USTR's public comments on this matter also raise the question as to whether a request by a Governor to be carved out of an existing commitment would in fact be honored in a timely manner. USTR appears to have expressed some nervousness about the possibility of facing such a request.[11]

The state of **California** (and specifically its Senate Subcommittee on International Trade) has also raised concerns regarding procurement chapters of Free Trade Agreements in letters to both USTR and the state's Governor. These concerns mirror many of the issues also raised by Maine, including:

- California laws prohibiting purchasing from companies that use sweatshop labor
- recycled content procurement requirements for paper and other products
- preferences for California companies in contract bidding
- pending legislation to address outsourcing of public sector jobs

This California legislative subcommittee also sought to remind the Governor of the legislature's traditional role in setting the state's procurement standards. Ultimately, the Governor did sign on to procurement chapters in recent FTAs. The legislature was further dismayed by Governor Schwarzenegger's veto of a bill that he acknowledged

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[10] "Fiscal and Policy Note (revised), Senate Bill 401," Department of Legislative Services, Maryland General Assembly, 2005 Session. The bill took effect 1 June 2005.

[11] See USTR Trade Facts, "State Government Procurement and Trade Agreements: Sending a Positive Signal About Welcoming International Business and Investment," 31 March 2006, www.ustr.gov. Readers are also referred to the newly-reorganized "Benefits of Trade" heading of the USTR website.

had substantial environmental/solid waste management benefits. The bill would have required road-building projects in California to utilize "crumb rubber" from used/ abandoned tires in the state. The Governor noted potential conflicts with NAFTA agreements—basically, that California couldn't discriminate against potential suppliers of used tires from Canada and Mexico. While the decision itself was dismaying, equally alarming to members of the California Senate Subcommittee on International Trade was the implication that a Governor felt that the mere existence of a "potential" procurement conflict was sufficient to veto legislation which the Governor himself had characterized as an example of "sound public policy." States had assumed it unlikely that the federal government would take a state to court in order to enforce provisions in the WTO General Procurement Agreement; a Governor's veto 'accomplished' essentially the same preemptive function.

The examples from Maryland and California both describe situations where the legislature and the Office of the Governor were not 'on the same page,' and where the Governor asserted the right to make decisions on procurement through use of veto powers, at the expense of the legislature's prerogatives—with very different outcomes in the two states. **Washington** state also went through a process of consultation between the legislature and the Governor, which resulted not in the withdrawal of Washington state from any procurement agreements—as the legislature had thought prudent. However, Governor Gary Locke did write to USTR and condition the state's participation in any procurement chapter on the state's continued ability to use preferences to conform with international labor and human rights standards. USTR failed to list the governor's condition in its schedule of committed states.

Maine is characterized by a somewhat different situation from these three states. A primary concern of the Maine CTPC has been—and should remain—interbranch coordination and the continued ability of the state to "speak with one voice" on trade policy matters. We now turn to a consideration of "offensive" and "defensive" strategies on state procurement strategies in relation to international trade agreement.

3) Government Procurement and Maine's future options.

We will discuss six different facets of government procurement where trade rules and social/environmental justice strategies loom large, and describe a range of policy options in each of these six areas. Before doing so, however, the basic question in relation to this report should be posed anew, namely: *can Maine effectively use state and local procurement to promote local and state economic development, and to condition state purchases on moral considerations regarding labor and human rights standards, without conflicting with trade rules?* The answer to this statement is equivocal. Maine *can* effectively use state and local procurement to promote economic development without conflicting with trade rules; however, Maine has already evinced an appetite for advancing local economic development concerns through procurement strategies that push into a "grey area" with respect to their consistency with trade rules. The state has shown an interest in requiring that companies employ local workers when the state purchases goods and services, and doing so would appear to violate the non-discrimination principle by choosing to purchase products based on the identity of the

bidder. The conscious purchase of renewable energy supplies—that is, energy purchases based on source of supply, rather than 'performance'—is also arguably a violation of WTO rules. Supporting Maine in its efforts to advance smart (and 'green') purchasing programs must proceed with the knowledge that many points of potential conflict with trade rules—or federal preemption—has not been settled. Rather than crafting a blueprint for action, then, this report simply acknowledges the series of political 'judgment calls' that face Maine public officials and the CTPC.

A related question: If Maine were to withdraw from all its current commitments under international trade agreements (such as the WTO GPA), would this 'solve' the problem of potential conflicts? From one perspective, the answer is quite clear: withdrawing from the WTO GPA (for example) would clarify that Maine did not intend to be bound by the restrictions contained in that agreement. Some in the state had advocated for Maine's immediate withdrawal from the WTO GPA, and this remains 'on the table' as a policy option. USTR would likely argue that the United States is already obligated under the GPA, and it cannot withdraw a state from an existing commitment—although USTR did make a political commitment to states during the WTO Uruguay Round negotiations that they remained free to change their minds and that USTR would renegotiate procurement commitments accordingly. It would also be instructive for the Maine CTPC to learn from Maryland's experience in this regard—noting also USTR's stated policy of only referring to the Governor's wishes with respect to coverage or non-coverage.

On the other hand, one interpretation of the federal government's responsibility vis-à-vis our trading partners is that it is *required* to force states to change laws that do not comply with the United States' international trade commitments, including under procurement. From that perspective, seeking to withdraw from an existing procurement agreement might be needlessly provocative if no specific concern has been raised by a U.S. trading partner with respect to (for example) Maine's anti-sweatshop and recycled paper requirements, and its modest contracting preferences for in-state companies. Maine most likely does not face a situation in which the state's Governor might veto sensible procurement policies that are based on environmental or social-justice considerations, as was the case in California. At the same time, the Maine CTPC may wish to push for a "clarification," such as that advanced by Washington's governor, that the state will reference to international labor and human rights standards as basic principles governing procurement by the state.

As was noted in a 2005 letter from Alan Stearns to USTR Chief Procurement Negotiator Jean Grier, "…my review of Maine law has shown that Maine has no barriers to state government procurement for companies from any country….Maine law currently provides reciprocity and openness [in its procurement approaches]." Thus, Maine complies with general transparency requirements contained in the GPA. It takes advantage of some of the safeguards written into the GPA, and procurement chapters of other FTAs, for example preferences given to the disabled.[12] Maine does use a State Purchasing Code of Conduct (Title 5, §1825-L) which conflicts with provisions of the

[12] See Maine Administrative Procedures and Services Title 5, §1826-A through §1826-D, found on-line at http://janus.state.me.us/legis/statutes/5/title5ch155sec0.html.

WTO GPA as interpreted by some member-countries;[13] and Maine provides some bidding preferences to domestic companies.[14] But it has *not* shut the door to foreign companies who want to bid on state contracts to supply goods and services.

However, USTR has not responded in a forthright manner to letters and concerns raised by Maine with respect to procurement safeguards—and this non-responsiveness itself suggests the need for "upping the ante" so as to ensure that Maine's concerns do get addressed. It is regrettable that failures of federal-state communication and USTR's punitive position on procurement have led to this impasse. It is suggested that, as the Maine CTPC works with the legislature and the Governor to advance a worker-friendly, "green" procurement strategy for the state, these policy initiatives are communicated to its Congressional delegation and copied to USTR's procurement negotiators. The Maine CTPC should work to keep open the possibility of meaningful dialogue regarding Maine's attempts to balance its commitments to in-state economic development, sensible use of taxpayer dollars for state procurement, and international trade obligations.

There is a practical difference between analyzing areas of potential conflict between Maine's state procurement authority and international trade rules—and as noted, such conflicts do exist—and stating the likelihood of an actual challenge being brought as a result of *x* or *y* action taken by the state. We will remain mindful of those differences in the analysis presented below. The general principle observed here is that Maine's trade-related concerns are taken most seriously when they:

- result from a process of in-state discussion based on democratic principles;
- reflect a consensus forged and maintained among the three branches of government;
- reflect a continued commitment to transparency and openness in public purchasing;
- proceed from analyses of specific actions that may be taken by the state or local governments, be they legislative decisions or purchasing procedures; and
- are communicated to the state's Congressional delegation, and where appropriate directly to USTR, to the National Association of State Procurement Officials, etc., so that in each case Maine is educating a broader audience about its democratically-derived choices, while also educating itself about "best practices" in procurement.

Finally, here are notes on six areas of procurement under discussion in Maine, as elicited in interviews with interested parties in the state and issued raised at Maine CTPC public hearings. The first three concern aspects of procurement that potentially cover all goods and services, and relate to Maine's interest both in economic development and in advancing a moral approach to state purchasing guidelines. The last three areas reference particular types of procurement, and as such, overlap with the concerns raised by the two other subcommittees of the Maine CTPC (Health Care and Natural Resources).

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[13] Developing countries frequently point to the WTO Singapore Ministerial Declaration of 13 December 1996 in arguing that labor standards should not act as barriers to trade. That declaration reads in part: "We reject the use of labor standards for protectionist purposes, and agree that the comparative advantage of countries, particularly low-wage developing countries, must in no way be put into question."

[14] Specifically, Maine has a "reciprocal preference law" that applies to businesses from other states that also have a domestic ("Buy American") purchasing preference.

a) Anti-Sweatshop. Maine has been the national leader in "anti-sweatshop" procurement through its first-in-the-nation adoption of a Code of Conduct on workers rights, and more recently with Governor Baldacci's letter to other governors inviting them to join in a "new collaborative effort to level the playing field for ethical businesses and advance justice for workers."[15]

As more states join onto the "Governors' Coalition for Sweatfree Procurement and Workers' Rights"—and as the enforcement provisions for implementation of these purchasing preferences are strengthened—it becomes correspondingly more likely that a U.S. trading partner may register a WTO (or other FTA) complaint regarding the conditions that this effort imposes. The WTO rules state that conditions for participation in bidding are limited to "those that are essential to ensure that the supplier has the legal, technical, and financial abilities to fulfill the requirements and technical specifications of the procurement." This phrase has been interpreted to mean that suppliers cannot be disqualified because of a company's labor or human rights record. A review of WTO jurisprudence suggests that while this phrase has been subject to some interpretation with respect to environmental concerns, there has been no claim brought forward at the WTO to curb any national or sub-national attempt to invoke labor standards as a reason for challenging a procurement measure.[16]

At the same time, it is worth noting that the current administration has not been favorably disposed to highlighting labor concerns in its recent FTA negotiations with developing-country partners. One example concerns the labor provisions in the US-Oman Free Trade Agreement. The Senate Finance Committee offered an amendment that would have required the Bush Administration to suspend free trade benefits on imported merchandise from Oman made under 'slave labor' conditions. USTR argued *against* the inclusion of this amendment in the final bill implementing the Oman FTA, stating that the text of the FTA already required Oman to enforce its own labor laws, which include prohibitions on slave labor. USTR vigorously defended its attention to labor concerns during the negotiation of the Central American Free Trade Agreement, going so far as to issue a "Fact Sheet" about labor and CAFTA.[17] However, leadership in the new Congress has already indicated to the administration that it will seek the renegotiation of trade pacts with Peru and Colombia to strengthen worker protections.

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[15] See Governor's 18 September 2006 press release on-line at www.maine.gov and www.sweatfree.org.

[16] Ironically, President Clinton did issue an Executive Order that sought to avoid the purchase of goods made with the worst forms of child labor, but that order *exempts* NAFTA and GPA member-countries because of concerns about inconsistency with U.S. trade commitments. Perhaps more relevant is Australia's national anti-sweatshop "code of conduct," which is much like that adopted by the state of Maine. To the best of our knowledge, Australia's code of conduct has not been challenged at the WTO.

[17] See "The Facts About CAFTA's Labor Provisions," USTR CAFTA Facts, February 2005, online at www.ustr.gov/assets/Trade_Agreements/Bilateral/CAFTA/Briefing_Book/asset_upload_file504_7188.pdf. The Maine CTPC, in its June 2005 letter to the Maine Congressional Delegation on CAFTA, noted the "overwhelming" opposition to DR-CAFTA voiced at public hearings, and in particular concerns about labor standards.

As the anti-sweatshop movement gathers force and moves from voluntary purchases made by private actors (universities, major league baseball, etc.) into binding municipal ordinances and state law, the question becomes whether the federal government will seek to preempt such actions, or whether a U.S. trading partner might bring a claim against "codes of conduct" and related measures. The Maine CTPC may wish to consider the following actions:

- Remind Maine's Congressional delegation of the state's Code of Conduct, and its strengthened enforcement provisions, and suggest this as an applicable standard for advancing labor rights in any future Free Trade Agreements. This could be a very timely contribution to the early-2007 debate on renewal/ non-renewal of the President's Trade Promotion Authority.
- Request that USTR state or certify that nothing in the state's Code of Conduct, or in other legislative actions, executive orders, etc. pertaining to labor standards, conflicts with Maine's obligations under the WTO GPA; ***or,*** if such certification is not forthcoming, request a specific 'carve-out' pertaining to those elements of the code that appear to be inconsistent with the WTO GPA; ***or,*** if a specific carve-out cannot be granted, requesting that the state be withdrawn from the listing of states that have committed to observing WTO GPA dictates in state purchasing. Note that even if USTR is willing to certify that the state's Code of Conduct were 'trade-rule-compliant,' this certification has no force of law. USTR would need to seek assurances from U.S. trading partners, perhaps through an exchange of Interpretive Notes or a modification of commitments, for this assurance to have any force in the international context. The Maine CTPC may also wish simply to inquire as to how it might seek a 'carve-out' on labor standards--asking USTR both to describe the process for clarifying a commitment, and ensuring that Maine's limitation on its GPA commitments would be noted in legal texts (recalling that Washington state's limitation was not so noted).
- In cooperation with other leaders in the Governors' Coalition for Sweatfree Procurement and Workers' Rights, seek an amendment to Annex II of the United States' Schedule to the General Procurement Agreement under the WTO (which covers sub-federal entities), possibly in the form of a "General Note," indicating that U.S. states and municipalities retain the right to pursue procurement policies that require certification of goods/services suppliers with respect to labor standards.
- State a position on the use of binding labor standards in the negotiation of future Free Trade Agreements.

b) Outsourcing. Concerns about the possible offshoring of state contract work led to the proposing of a bill to prohibit "any Maine Government department, agency, or bureau from conducting business with any entity that outsources its services outside the United States." The bill was later amended to a study of contracting and out-

sourcing practices.[18] Concerns regarding outsourcing may arise in future legislative sessions, depending in part on the results of the data collection mandated in LD 471.

As with the "anti-sweatshop" legislation, constitutional and WTO GPA questions with respect to state "anti-outsourcing bills" have been raised by those opposing such legislation.[19] And again, it does not appear that either the federal government or the World Trade Organization would relish the fight that a challenge to these state laws would entail.[20] At the same time, federal "anti-outsourcing" legislation appears a far more remote possibility than "anti-sweatshop" action at the federal level or the mandating of stronger overseas labor provisions as part of future trade agreements. With this in mind, states will remain the key drivers of innovation (or, depending on one's point of view, punitive action) with respect to outsourcing and government procurement.

Aside from outright bans on outsourcing of state contract work and the privatization of services performed by state employees, other states have enacted a variety of restrictions, including:

- **Protecting the privacy of medical or financial information.** The California legislature has passed several laws that forbid sending certain medical or financial information offshore to jurisdictions that do not have sufficient privacy protections. The European Union has also enacted very strict laws on the transfer of data to countries outside the EU.[21] Other states have approached this question using a consumer "right to know" approach, which doesn't ban such work from being done offshore, but requires notification of the affected party.
- **Public reporting of the location of work performed offshore.** Such legislation requires contractors and subcontractors to report where work on state contracts is performed. Such information is made accessible to citizens through a state website.
- **Certifying that work is done in the United States.** Requires, as part of a bid, that a contractor certify that it has the ability to perform the contract with workers located in the United States.
- **Restricts the ability of companies that send work offshore work to bid on state contracts or to receive state subsidies.** Again, this is short of a ban on

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[18] See text of LD 471, signed by the Governor 12 May 2005.

[19] See "Exporting the Law – A Legal Analysis of State and Federal Outsourcing Legislation," Shannon Klinger and M. Lynn Sykes, National Foundation for American Policy, April 2004, on-line at: www.nfap.com/researchactivities/studies/NFAPStudyExportingLaw_0404.pdf. This study summarizes why "state and federal legislation to restrict outsourcing may violate the U.S. Constitution and jeopardize U.S. obligations under international trade agreements," and argues that "prohibitions on state contract work being performed overseas are the most legally suspect category of proposed outsourcing legislation."

[20] In several states, Governors were persuaded to veto anti-outsourcing bills, and cite potential trade conflicts as a reason why. In California, Governor Arnold Schwarzenegger vetoed three bills in 2004 that would have placed serious restrictions on outsourcing. Vetoing the bill on state contracting, AB 1829, the Governor noted that the bill would "restrict trade, invite retaliation or violate the United States constitution and our foreign trade agreements."

[21] See EU Directive 95/46/EC, Articles 25 and 26. The United States subsequently concluded a "Safe Harbour Agreement" with the European Union allowing for the transfer of information to American companies, although US banks are not eligible for this scheme.

offshoring, but does create economic disincentives for companies. Note that such measures may be taken with respect to *any* offshoring, not just work contracted by the state, and thus is potentially a very powerful tool.[22] Another approach is just to require companies to communicate to state authorities any outsourcing/offshoring of jobs in a given year.

- **Designation of "critical infrastructure."** Finally, while this is primarily a federal matter, questions have been raised as to whether it is a good idea, from a national security perspective, to allow for international competitive bidding on projects that concern U.S. port, water, energy, telecommunications, or transportation infrastructure, particularly if such installations are seen as potentially vulnerable to terrorist attack or disruption. Governors from several states affected by the "Dubai Ports" takeover bid raised concerns about such contracting. Maine was not directly affected by this controversy.[23]

It appears that issues of outsourcing in relation to state contract work/procurement in Maine are still in some flux. Given that state legislation is a moving target, it would be premature to make recommendations or suggest a policy menu for engaging on outsourcing questions in relation to procurement and international trade. As a study item for 2007, the Maine CTPC could communicate with public officials from states that have trade oversight mechanisms and have taken up the issues pertaining to the outsourcing of state contract work. The states where state oversight committees have conducted oversight hearings on this topic are California and Washington. Closer to home, Connecticut and New York are two states that have adopted legislation restricting state contracting and limiting development assistance to companies that outsource overseas.

c) Selective purchasing based on broad human rights considerations. A third area of human and labor rights concerns is that of "selective purchasing," in which a state or municipality chooses *not* to do business with—or, in the case of state pension funds, divests from—a corporation that also does business with countries or in countries that are known as egregious violators of human rights. Such "selective purchasing" laws were pioneered during the 'anti-apartheid' movement. Building on an in-state history of anti-apartheid activism, the Commonwealth of Massachusetts passed a law in 1996 that effectively prohibited companies that do business with the Union of Myanmar (Burma) from providing goods and services to Massachusetts state agencies. The first such selective purchasing law passed by a state in the WTO era, it resulted in a WTO challenge brought by Japan and the European Union. These WTO members argued that Massachusetts' procurement policy violated the supplier

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[22] It also raises a host of constitutional issues. See "Exporting the Law," *supra* Note 19.

[23] The "Dubai Ports" controversy was not an outsourcing/contracting issue *per* se; rather, it had to do with the takeover of Peninsular & Oriental, a British company that provides logistical/management services for six U.S. ports, by the company Dubai Ports World. In her role as the Chair of the Homeland Security and Governmental Affairs Committee, Senator Susan Collins introduced a resolution that called for an expanded review of this proposed deal. See press release, "Senator Collins Introduces Resolution Calling for Thorough Review, Congressional Consultation Before Dubai Ports World Deal Could Proceed," Office of Senator Susan Collins, 27 February 2006. The press release does not mention Maine.

qualification rule under the WTO GPA by imposing conditions of a political nature, not essential to fulfilling the contract.[24]

The WTO challenge was suspended when a domestic plaintiff, namely the National Foreign Trade Council, sued to block Massachusetts' measure in the U.S. District Court on several grounds.[25] Eventually the U.S. Supreme Court held that the Massachusetts law was preempted by the federal sanctions on Burma; it did not role on the other constitutional claims.[26] Consequently, the WTO dispute involving provisions of the GPA did not move forward to consideration by a dispute panel, as so the 'legality' of these GPA provisions pertaining to the use of human rights criteria in state purchasing decisions have not yet been interpreted. At the same time, it is worth noting that several municipalities, including entities as large as the City of Los Angeles, have kept Selective Purchasing Laws in place without sustaining court challenges.

Issues of divestment and selective purchasing are back in the news, this time with respect to Sudan, a country that stands accused of genocide in Darfur. Maine's legislature passed, and Governor Baldacci signed LD 1758, which calls for Maine to divest from all companies doing business in Sudan.[27] In so doing, Maine joins a number of other states that have also pursued divestment.

In August of this year, the National Foreign Trade Council sued the State of Illinois, naming the State Treasurer and Attorney General specifically in its complaint. The complaint argues that "the Illinois Sudan Act compels financial institutions to choose between refusing to make loans to borrowers engaged in dealings with Sudan that are lawful under federal law, on the one hand, and abjuring the receipt of Illinois state funds, on the other."[28] This law has a more limited reach than the "Massachusetts-Burma" law. However, NFTC has made arguments similar to those advanced in the Massachusetts-Burma law case, namely that the existence of federal government sanctions "pre-empts" any state or local sanctions.

There are federal sanctions in place against the government of Sudan. Those sanctions were reauthorized in September of this year. Versions of the bill that include provisions that supported state divestment issues passed *both* the House and

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[24] In all, the EU and Japan challenged three articles of the General Procurement Agreement. See "United States – Measures Affecting Government Procurement, Request for Consultation by the European Communities," WTO/DS**1, GPA/DS2/1, 26 June 1997. See also "Basic Human Rights Tools Eliminated by WTO Procurement Rules," fact sheet prepared by Public Citizen.

[25] The NFTC claimed that the Burma law was preempted by federal sanctions on Burma; violated the Commerce Clause; and infringed on federal foreign affairs power.

[26] This narrow verdict begs the question as to whether state-level programs of this type would be legal in the absence of federal sanctions. See "Preliminary Analysis of Supreme Court Decision: Impact on Options for Free-Burma Legislation," Robert Stumberg and Matthew Porterfield, Harrison Institute for Public Law, Georgetown University Law Center, 20 June 2000.

[27] "…Baldacci said the order would require the Maine State Retirement System to divest itself of more than $50 million in holdings from companies doing business in Sudan." Bangor Daily News, 19 April 06.

[28] See complaint registered in the United States District Court, Northern District of Illinois Eastern Division; on-line at www.nftc.org/default/sudan%20lawsuit/NFCT%20v.%20Topinka%20compliant.pdf.

the Senate—but in conference, this language was removed, at the request of the Bush administration.[29]

The National Foreign Trade Council, in lobbying against the inclusion of state divestment language, argued that the lawsuit in Illinois should be allowed to run its course. Should the NFTC prevail in that case, Maine's law would likely also come under attack. However, should Illinois prevail in the case, there is the possibility that the sort of case that was shelved at the World Trade Organization concerning the "Massachusetts-Burma law" might be brought forward with respect to the case of Sudan.

Issues of divestment and Sudan were raised at one of the Maine CTPC's public hearings, and this is of clear concern to Maine's citizenry. Options open to the Maine CTPC include:

- Urging the new Congress to take up the question of sanctions against Sudan, specifically revisiting the question of support for state divestment actions. While this would not prevent a possible WTO challenge to state actions, the inclusion of such support into the federal program of sanctions would certainly "raise the bar" on any such challenge being brought forward from a U.S. trading partner.
- Analyzing the legal differences between the state's divestiture law on Sudan and the "Massachusetts Burma Law" from the perspective of a potential WTO challenge. Specifically, is there the possibility that a challenge could be made through the General Procurement Agreement? Or through WTO-GATS provisions on "non-discrimination," given U.S. scheduling of commitments under "Financial Services"? Could companies or financial institutions domiciled in a NAFTA or CAFTA country bring an investment claim against US state divestiture laws?
- Working with the divestiture movement, and with Offices of Attorneys General and Treasurers in other states with divestment laws on the books, to develop a joint letter to Congress and/or USTR outlining concerns that Maine's LD 1758, and similar legislation in other states, could become the subject of a WTO challenge. A multi-state strategy which sought to clarify the relation between human rights concerns and the extent of "non-discrimination" provisions in WTO agreements—not just intentional discrimination, but also qualification requirements and technical specifications—would raise the profile of human rights concerns in relation to trade.

d) Local food procurement. In this section we expand on questions raised in the Forum on Democracy & Trade's report to the Natural Resources Subcommittee of the CTPC, which analyzes international trade commitments/negotiations in relation to Maine's agriculture and forestry sectors. Maine is not a major beneficiary of the federal system of crop supports—a system which has been challenged at the WTO by Brazil with respect to one crop (cotton), and which has been under attack generally by US trading partners in the WTO Doha Round of negotiations. We have suggested that shifting federal rural-sector spending to more trade-compliant forms of support

[29] "Divesters lose skirmish in Sudan battle," **The Hill,** 27 September 2006; on-line at www.thehill.com/thehill/export/TheHill/Business/092706_biz3.html.

might help alleviate these trade tensions, and most importantly, shifts to "Green Box" and other non-distorting forms of support could provide much greater economic benefits to Maine's rural sector in a revamped Farm Bill.

Among the non-trade-distorting strategies considered was greater support for "farm to school" and other local food purchasing programs, connecting Maine farmers with local markets and institutional food buyers. In this section we briefly consider the procurement issues surrounding local food purchasing.[30] We believe that the prospect of a "trade conflict" arising with respect to the way that local food procurement is practiced in Maine—now or for the foreseeable future—is extremely remote:

- Maine does not have a central entity coordinating statewide local food procurement efforts. To date, procurement appears to have been carried out by individual school districts and local governments, with assistance from the State Departments of Agriculture and of Education. As noted above, local governments are not subject to the rules of the WTO GPA or other procurement agreements.
- Even if the Maine Department of Agriculture became the "procuring entity" for local food purchases, the dollar thresholds at which GPA rules come into play are generally beyond the dollar amount used for most local food purchases.
- Even if the state of the Maine became the "procuring entity," and contracts were large enough to trigger WTO GPA disciplines, bid contracts are likely to specify "freshness" as a performance criteria relevant to the goods concerned.[31]

While not a question specific to trade rules on procurement, we feel it is worth clearing up a common misperception that states cannot use USDA funds to implement local purchasing preferences. (Use of state funds, of course, is not subject to such constraints.) The 2002 Farm Bill did create a program for local purchases.[32] Thus while the Maine CPTC may wish to argue for dramatic increases in federal

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[30] We would like to thank Heather Albert-Knopp for her assistance in understanding "Farm to School" purchasing issues in Maine.

[31] A conflict is marginally more likely if Maine were to use local-preference criteria for the purchase of substantial quantities of processed foods for use in Maine's schools and correctional facilities.

[32] Found in the 2002 Farm Bill at Section 4303, "PURCHASES OF LOCALLY PRODUCED FOODS":
"Section 9 of the Richard B. Russell National School Lunch Act (42 U.S.C. 1758) is amended by adding at the end the following:
``(j) Purchases of Locally Produced Foods.--
``(1) In general.--The Secretary shall--
``(A) encourage institutions participating in the school lunch program under this Act and the school breakfast program established by section 4 of the Child Nutrition Act of 1966 (42 U.S.C. 1773) to purchase, in addition to other food purchases, locally produced foods
for school meal programs, to the maximum extent practicable and appropriate;
``(B) advise institutions participating in a program described in subparagraph (A) of the policy described in that subparagraph and post information concerning the policy on the website maintained by the Secretary;…"
The 2002 Farm Bill Conference Committee report noted that *"The Senate amendment requires the Secretary to: encourage institutions participating in the School Lunch and Breakfast programs to purchase locally produced foods, to the maximum extent practicable and appropriate and in addition to other food purchases;….The Conference…adopts the Senate provision."*

support of "farm to school programs" as part of its advocacy around reauthorization of the Farm Bill in 2007, the principle that institutions can craft purchasing preferences for local foods, "to the maximum extent practicable and appropriate," is already in place. A new "farm to school" listserve coordinated by representatives from the state departments of education and agriculture should assist in informational exchange about the important economic development issues pertaining to "Farm to School" efforts at the local level in Maine. For purposes of this report, we simply report that, with respect to trade rules, there at present are minimal 'downside risks' to aggressively expanding local food purchasing preferences. If the State of Maine became a significant "procuring entity" of foodstuffs in future, and vigorously pursued local preference programs in its procurement, then the Maine CTPC might wish to revisit the issue at that time.

Renewable energy procurement. In 2003, the Maine legislature asked the Department of Environmental Protection to develop an "action plan" for reducing greenhouse gas (GHG) emissions contributing to global warming. This resulted in the release of the Climate Action Plan in 2004.[33] Maine is part of the Regional Greenhouse Gas Initiative (RGGI), an aggressive plan involving eight states that (it is hoped) will reduce the "carbon footprint" of New England and other eastern-seaboard states. Maine has also:

- Adopted GHG emissions targets of 1990 levels by 2010, and 10% below 1990 levels by 2020
- Adopted California's vehicle greenhouse gas emissions standard
- Developed a voluntary public benefits fund dedicated to supporting energy efficiency projects
- Developed a renewable energy portfolio standard

This set of programs/mandates suggests that Maine takes seriously its efforts to combat climate change. Among the "Recommended Options" found in the Maine Climate Action Plan are such items as carbon offset requirements, renewable energy benefit charges, energy efficiency measures for state buildings, and low GHG preferences for fuels used by the state vehicle fleet. If these GHG abatement options were aggressively implemented; if Maine made state purchasing decisions based on the Climate Action Plan; and if, through adopting a renewable energy portfolio standard, Maine showed a clear "process" preference for some technologies based on their low-emission characteristics, this would suggest that Maine was making procurement choices that incorporated specific performance characteristics. Consequently, it could be argued that these measures conflict with Maine's undertakings as part of the WTO GPA.[34]

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[33] For an overview of the plan and link to documents, see http://www.state.me.us/dep/air/greenhouse.

[34] The use of criteria that may not be "necessary to ensure the quality of the service" with respect to electricity services, for example, may also run afoul of proposed rules now under discussion in the WTO General Agreement on Trade in Services' "Working Party on Domestic Regulation." This issue is extensively discussed in the Working Group on Trade and Energy Policy's "Interim Report on GATS and Electricity," and will not be discussed further here. See the report, released 15 April 2005, on-line at: http://www.forumdemocracy.net/public_leadership/documents/gatsandelectricity0405.pdf.

Here again is a situation where a particular reading of the WTO rules suggests that Maine's aggressive action on climate change—including the use of GHG emissions as an evaluative lens for state procurement choices—could lead to a trade conflict. However, we feel that a trade challenge based on the WTO-GPA or the procurement chapter of another FTA is unlikely.

To begin with, most of the signatory countries of the WTO GPA are also signatories of the Kyoto Protocol, and have evinced a level of alarm on climate change similar to that shown by the New England states. Generally, the countries that have committed to substantial GHG emission reductions have also applauded the actions of U.S. state and local governments to come to grips with climate change, and appreciate the role played by sub-federal governments in pushing a national discussion on this issue. Consequently, it is unlikely that they would instigate any action designed to dissuade states from taking this issue seriously.

As a practical matter, Canada is the only country affected by Maine's choices with respect to electricity procurement, since it shares grid interconnections with Maine and because utilities in the Atlantic provinces of Canada do sell electricity to Maine. Maine's Renewable Portfolio Standard is constructed in such a way so as to exclude power from most major Canadian hydropower installations (only hydropower from facilities less than 100MW in size 'count' under RPS definitions). Consequently, it is at least theoretically possible that HydroQuebec or other suppliers might persuade the federal government of Canada to bring a claim under the WTO GPS (or GATS, or NAFTA's Services Chapter), arguing that Maine's laws are "discriminatory" with respect to its purchase of electricity (including purchase for resale to consumers). However, these Canadian utilities are working to bring more renewable energy options on-line; there are regional processes to deepen the integration of New England's electricity markets with those of eastern Canada; and Governor Baldacci has stated an interest in exploring greater power purchases and grid interconnection from Quebec and the Canadian Maritime provinces.[35] Under such circumstances, the filing of a WTO claim on government procurement of energy would be disruptive. Of course, circumstances could change, and the situation bears monitoring by the Maine CTPC. It is also conceivable that a Canadian corporation could "freelance" and bring an investor claim against the United States under NAFTA's Chapter 11, if it felt that its access to the American market was hampered by the actions of states to give contracting and purchasing preference to suppliers of low-emission fuels and electricity services.

Beyond the monitoring of possible threats, however, lies a much broader question, having to do with the "general exceptions" allowed under the WTO GPS and other FTA procurement chapters. Would a procurement strategy that evinced a major

[35] Maine's Public Utility Commission recently appealed a Federal Energy Regulatory Commission decision to raise rates in the state. Maine feels that these rate increases respond primarily to demand increases in southern New England. Governor Baldacci suggested that Maine might even wish to reevaluate the state's continued participation in ISO-New England. See "FERC raises electricity rates," Mal Leary, Bangor Daily News, 3 November 2006.

concern for combating climate change be considered as "measures necessary to protect human, animal, or plant life and health"? To what extent can the rules of the international trading system be made to respond to, or at least not impede responses to, the threat of climate change? While several institutions have attempted to come to grips with the conflicts and compatibilities between international trade rules and international GHG abatement regimes, for the most part debates about the rules governing trade and climate change have tended to run on parallel tracks.[36] As the Regional Greenhouse Gas Initiative gathers momentum, and as states that have adopted an aggressive stance on combating climate change increase their mutual interaction and sharing of information, there are two possible actions to consider:

- Work with other states, and possibly with the International Trade Commission (ITC) in Washington DC, to address the ways in which trade rules may or may not "defer to" concerns regarding global climate change. In particular, examine whether procurement strategies and domestic regulations that do not specifically discriminate against foreign suppliers of goods and services, but nonetheless change the conditions of competition, would be covered under the WTO GPA's "General Exceptions" protecting human, animal, and plant life. Understand the set of policy responses—safeguards, interpretive notes, etc.—that could be used to clarify the relationship between government procurement (and state/local regulatory decisions) based on a concern for climate change, and provisions in the WTO GPA, GATS, and Free Trade Agreements (including Investment chapters).
- Work with other states to develop cooperative purchasing mechanisms designed specifically to address climate change and advance renewable energy usage. Smaller states have used cooperative purchasing arrangements to maximize economies of scale for particular purposes. Such sharing of information could reduce costs, accelerate the growth of renewable energy businesses, and create a "best practice" set of responses to climate change.[37]

f) Pharmaceutical purchases. Maine is a recognized national leader in managing prescription drug costs and expanding access to medicines for low-income and disabled citizens. Some of its cost-control measures have already been extensively litigated, for example in the landmark case *PhRMA v. Walsh.* One major concern with respect to drug purchasing is the relevance of the "government authority exclusion"—whether programs in which the state purchases drugs for resale would be

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[36] See for example "International Trade and Climate Change Policies," Duncan Brack et al., Royal Institute for International Affairs, 1999; "Project on Sustainable Energy Transition, Climate Change, and International Trade," International Center for Trade & Sustainable Development, Geneva, project description at http://www.trade-environment.org/page/ictsd/projects/energy_desc.htm. Note that the European Commission recently commissioned a paper that suggests levying border tariffs on goods produced in countries that do not use a CO_2 cap on their industries, as a way to make the EU carbon offset scheme more competitive: http://www.euractiv.com/en/sustainability/eu-moots-border-tax-offset-costs-climate-action/article-158641; and still more provocatively, the political stance of the New Zealand Green Party, which argued last month at global climate talks that nations that have not signed onto the Kyoto Protocol should have their rights of WTO membership revoked.

[37] See "Strength in Numbers: An Introduction to Cooperative Procurements," National Association of State Procurement Officials, February 2006.

deemed as a “service provided in the exercise of government authority” or not, and consequently not subjected to GATS disciplines on distribution services, etc. Also relevant are negotiations on GATS and procurement mentioned in the first section of this report--if such negotiations move forward. Negotiations in this part of the GATS could lead to new trade rules for procurement and subsidies of services, affecting Preferred Drug Lists, the regulation of Prescription Benefit Managers, and in general how the state purchases medicines on behalf of its citizens.

The Forum’s report to the Health Care Subcommittee of the Maine CTPC looks at GATS in relation to health insurances services. Since a pharmaceutical benefit is usually part and parcel of an insurance service, issues pertaining to drug benefits within health insurance are relevant here. The potential conflict between trade rules and prescription drug purchasing by states and towns is not usually framed as a stand-alone procurement issue. Analysis of potential conflicts between trade rules and drug purchasing programs such as Maine Rx should probably draw from the GATS analysis already completed for the Health Care Subcommittee. Further, in the new federal Congress there may be substantial changes proposed in how various drug benefits are handled and how prices are negotiated, with significant impact on state programs, as well. As the Maine CTPC deepens its analysis of GATS and health programs generally, issues pertaining to pharmaceutical purchasing will arise. The outlines and possible recommendations found in the Health Care Subcommittee report are suggested as templates for possible further research and action with respect to pharmaceutical purchasing by the state.